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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6 * * *

7 Deandre Morrow,

8 Plaintiff,

9 v.

10 Fess Security, et al.,

11 Defendant.

Case No. 2:20-cv-00307-APG-BNW

12 **ORDER**

13 Pro se plaintiff Deandre Morrow brings this case against Fess Security and its CEO Paul
14 Marsh, making various allegations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§
15 2000e–2000e-17. ECF No. 1-1. Morrow filed this action and attached a financial affidavit to his
16 Application to Proceed *in forma pauperis* as required by 28 U.S.C. § 1915. ECF No. 1. The Court
17 finds that plaintiff is unable to pre-pay the filing fee and his application to proceed *in forma*
18 *pauperis* is granted.

19 **I. Background**

20 Morrow worked for Fess Security for four years. ECF No. 1-1 at 2. In his complaint,
21 Morrow states the following: “I had previously blown the whistle on an issue I had with an
22 employee on the event I was sent to do security for. I was racially profiled and told that my kind
23 they do not hire.” *Id.* The Court, taking these two sentences in context, infers that Morrow is
24 describing a single incident here, wherein a fellow unnamed employee made a discriminatory
25 comment about him.

26 After Morrow complained to the company’s general manager about this, his supervisor,
27 Jay, stopped calling him for work assignments for a period of time, telling him there was no work
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1 for Morrow. *Id.* Morrow was eventually given work again after Jay told him that Morrow was to
 2 air any issues only with him. *Id.* at 3.

3 Morrow also alleges that a female supervisor, Dion, consistently treated him aggressively
 4 during his four years at Fess, “yelling and cursing” at him on one occasion, and that this treatment
 5 was due to Morrow’s gender. *Id.* When he complained about her to Jay, he was moved to a
 6 different area for work and Dion began creating “a more hostile work environment.” *Id.* at 3–4.
 7 Further, Morrow was denied lunch and bathroom breaks during a 12-hour shift that he had to
 8 work on his feet. *Id.* at 4.

9 Later, when Morrow once again complained about Dion to Jay, Jay told him that nothing
 10 would be done about Dion’s behavior, and he could quit if he did not want to accept this. *Id.*
 11 Morrow subsequently quit his job. *Id.* Morrow alleges has received a right-to-sue letter from the
 12 EEOC. *Id.* at 2.

13 **II. Analysis**

14 **A. Screening standard**

15 Upon granting a request to proceed *in forma pauperis*, a court must screen a complaint
 16 pursuant to 28 U.S.C. § 1915(e). Federal courts may dismiss a case if the action is “frivolous or
 17 malicious,” fails to state a claim on which relief can be granted, or seeks monetary relief from a
 18 party who is immune from such relief. 28 U.S.C. § 1915(e)(2).

19 A complaint should be dismissed for failure to state a claim “if it appears beyond a doubt
 20 that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief.”
 21 *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). In making this determination, the Court
 22 takes as true all allegations of material fact stated in the complaint. *See Warshaw v. Xoma Corp.*,
 23 74 F.3d 955, 957 (9th Cir. 1996).

24 A complaint must contain more than a “formulaic recitation of the elements of a cause of
 25 action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
 26 something more . . . than . . . a statement of facts that merely create a suspicion [of] a legally
 27 cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* §
 28 1216, at 235-36 (3d ed. 2004)). At minimum, a plaintiff should state “enough facts to state a

1 claim to relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,
2 678 (2009).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks
5 that legal standard. *See Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Finally, the Court
6 liberally construes a complaint by a pro se litigant. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.
7 2007).

8 **B. Screening the complaint**

9 The Court believes that Morrow is attempting to bring claims for discrimination, retaliation,
10 and hostile work environment under Title VII.

11 **1. Discrimination**

12 In order to allege a prima facie case of discrimination in violation of Title VII, the plaintiff
13 must allege: (1) he belonged to a protected class; (2) he was qualified for the position; (3) he was
14 subjected to an adverse employment action; and (4) similarly situated employees not in his
15 protected class received more favorable treatment. *See Moran v. Selig*, 447 F.3d 748, 753 (9th
16 Cir. 2006) (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 818 (9th Cir. 2002)).

17 An adverse employment action is one that “materially affects the compensation, terms,
18 conditions, or privileges of employment.” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1093 (9th Cir.
19 2008). The Supreme Court has held that “offhand comments, and isolated incidents (unless
20 extremely serious)” do not constitute discrimination under Title VII. *Clark County School District*
21 *v. Breeden*, 532 U.S. 268, 270–271 (2001).

22 Morrow has not established that he belongs to a protected class, as nowhere in his
23 complaint does he state the racial group to which he belongs, thereby failing to allege the first
24 element. Turning to the second element, while Morrow notes that he worked for Fess Security for
25 four years, he has not alleged that he was qualified for the job or provided facts explicitly in
26 support of this proposition. He has therefore failed to allege the second element. As for the third
27 element, Morrow alleges only an isolated comment by a fellow unnamed employee with few
28 details regarding the circumstances of the interaction; these sparse allegations do not meet the

1 *Breeden* standard. Therefore, he fails to successfully allege the third element of his discrimination
2 claim. With regards to the final element, while Morrow alleges that he faced a potentially
3 discriminatory comment from his co-worker, he fails to allege whether other employees outside
4 his protected class and in similar positions received the same kind of treatment or comment.
5 Therefore, Morrow has not alleged that similarly situated employees not in his protected class
6 received better treatment.

7 Accordingly, Morrow fails to sufficiently allege this first claim for discrimination, and the
8 Court dismisses it without prejudice. It will grant Morrow leave to amend his complaint, so that
9 he may try a second time to allege facts that meet all four elements.

10 Morrow's second claim involves gender discrimination. Morrow alleges that a female
11 supervisor, Dion, consistently spoke to him in an aggressive and derogatory manner, and that she
12 tended to treat male employees in this way.

13 With regards to the first element, Morrow has established that he was a member of a
14 protected class, since "Title VII's prohibition of discrimination 'because of ... sex' protects men as
15 well as women." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). As noted
16 above, he has failed to allege that he was qualified for his position, thereby failing to satisfy the
17 second element. Turning to the third element, Morrow alleges that Dion treated him in an
18 aggressive and derogatory manner for four years, but only alleges one instance of "yelling and
19 cursing." ECF No. 1-1 at 3. An isolated incident such as this does not constitute discrimination as
20 per *Breeden* unless it is "extremely serious." *Breeden*, 532 U.S. at 271. Morrow does not allege
21 what made Dion's manner come off as aggressive beyond this one isolated instance, and an
22 isolated incident is not an adverse action under *Breeden* unless it is "extremely serious." Without
23 more factual enhancement, the Court cannot assess the "yelling and cursing" was sufficiently
24 serious or extreme to change the terms and conditions of Morrow's employment. Morrow
25 therefore fails to allege an adverse employment action. Further, with regards to the fourth
26 element, Morrow has not established that similarly situated employees who were not men
27 received better treatment from Dion than he did.
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1 Accordingly, Morrow fails to sufficiently allege this second claim for discrimination, and
2 the Court dismisses it without prejudice. As with his first claim, the Court will grant Morrow
3 leave to amend his complaint.

4 **2. Retaliation**

5 In order to allege a prima facie case of retaliation in violation of Title VII, an employee
6 has to allege: (1) “that she engaged in protected activity”; (2) “that she suffered a materially
7 adverse action that would deter a reasonable employee from making a charge of employment
8 discrimination”; and (3) “that there is a causal connection between the protected activity and the
9 adverse action.” *See Porter v. California Dept. of Corrections*, 419 F.3d 885, 894 (9th Cir. 2005).

10 Morrow appears to make two separate retaliation claims. The first concerns a
11 discriminatory comment by a fellow unnamed employee. To qualify as protected activity, an
12 employee's complaint must have been based on a reasonable belief that he was opposing an
13 employment practice made unlawful by Title VII. *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d
14 1008, 1013 (9th Cir. 1983). Informal complaints about alleged discrimination constitute protected
15 activity. *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 506 (9th Cir.
16 2000). Determining whether an isolated incident or offhand remark is a Title VII violation
17 involves “[l]ooking at all the circumstances, including the frequency of the discriminatory
18 conduct [and] its severity.” *Breeden*, 532 U.S. at 271.

19 Morrow alleges that a fellow employee told him his “kind they do not hire” and that he
20 complained to the company general manager about this. ECF No. 1-1 at 2. To satisfy the first
21 element of the retaliation claim, Morrow must have had a reasonable belief that his complaint was
22 opposing an unlawful employment practice. In *Breeden*, an isolated incident involving an off-
23 color remark was deemed insufficient to support an employee’s reasonable belief of an unlawful
24 employment practice. *Breeden*, 532 U.S. at 271. It is similarly unclear here that an isolated
25 discriminatory comment could form the basis for a reasonable belief of an unlawful employment
26 practice, or reasonably be considered “extremely serious” under *Breeden*, given Morrow does not
27 allege details of the context or manner of the unnamed employee’s comment. *Id.* Therefore,
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1 Morrow's allegations do not meet the first elements because he failed to allege that he engaged in
2 a protected activity.

3 With regards to the second element, Morrow has not established that he was subjected to a
4 materially adverse action that would discourage other employees from making similar
5 complaints. Morrow has not stated how the lack of assignments affected him adversely, as he
6 does not tie them to his pay, advancement in the company, or any other material interest. Morrow
7 has also failed to allege the duration of the period he was not called for work. Accordingly,
8 Morrow's allegations do not meet the second element of his claim.

9 Turning to the third element, plaintiff must plead a "but-for" causal link between the
10 protected activity and the adverse employment action. *See Univ. of Texas Sw. Med. Ctr. v.*
11 *Nassar*, 570 U.S. 338, 360 (2013). Causation may be established when adverse employment
12 decisions are taken within a reasonable period of time after complaints of discrimination have
13 been made. *Yartzoff v. Thomas*, 809 F.2d 1371, 1375–76, (9th Cir. 1987). Morrow alleges
14 "[w]hen I let the GM of the company know what had happened my supervisor Jay stopped calling
15 me for work." ECF No. 1-1 at 2. The plain meaning of "when" is "at or during the time that."¹
16 Therefore, the Court infers that Morrow stopped receiving assignments in the direct aftermath of
17 making his complaint. ECF No. 1-1 at 2. Moreover, he received work only after his supervisor
18 instructed him to bring complaints only to him. Thus, Morrow satisfies the causation element of
19 this retaliation claim.

20 However, to proceed with this first retaliation claim, Morrow must allege true facts that
21 meet **all three** elements. Because Morrow fails to sufficiently allege the first and second
22 elements, the Court dismisses this first retaliation claim without prejudice. It will grant Morrow
23 leave to amend his complaint so that Morrow may again try to allege facts that meet all three
24 elements.

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28 ¹ *When*, Merriam-Webster Dictionary, <http://www.merriamwebster.com/dictionary/when> (last visited August 12, 2020).

1 Morrow's second retaliation claim involves his complaint about Dion's aggressive
2 behavior. Morrow alleges that Dion was consistently aggressive towards him, and states that,
3 following his complaint about her, she began "creating a more hostile work environment,"
4 indicating that Morrow perceived there to be an existing hostile environment. ECF No. 1-1 at 4.
5 Morrow therefore establishes that he had a good-faith belief that he was opposing an unlawful
6 employment practice when he made his complaint about Dion. *Kelly*, 716 F.3d at 14. As a result,
7 Morrow successfully alleges that he engaged in a protected activity for the purposes of his second
8 retaliation claim.

9 Morrow has also alleged that he suffered materially adverse actions which would deter
10 other employees from making similar complaints: after his complaint, he alleges that Dion
11 intensified her mistreatment of him; Morrow was not given breaks when working a shift; and he
12 was explicitly told that he could quit if he did not like Dion's behavior. Morrow further alleges
13 that "[a]fter saying something about it I was removed from my position and moved to a farther
14 location." ECF No. 1-1 at 4. These allegations are sufficient at this juncture to meet the second
15 element of his claim.

16 However, Morrow does not allege how soon after his complaint these adverse actions
17 occurred, and he therefore fails to establish a but-for causal connection between the protected
18 activity and the adverse action. *Yartsoff v. Thomas*, 809 F.2d 1371, 1375–76 (9th Cir. 1987).
19 Without this causal connection, Morrow fails to meet the third element of his claim.

20 Accordingly, Morrow fails to sufficiently allege this second claim for retaliation, and the
21 Court dismisses it without prejudice. It will grant Morrow leave to amend his complaint by
22 alleging facts that satisfy the elements of his claim.

23 **3. Hostile work environment**

24 To allege a prima facie case of hostile work environment based on gender
25 under Title VII, a plaintiff must allege that (1) he was subjected to verbal or physical harassment
26 based on gender, (2) the conduct was unwelcome, and (3) the conduct was "sufficiently severe or
27 pervasive to alter the conditions of the plaintiff's employment and create an abusive working
28 environment." *See Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002).

1 Morrow alleges that Dion treated him in a derogatory manner for the duration of his
2 employment, and after his complaint about her she “began creating a more hostile work
3 environment.” ECF No. 1-1 at 4. However, Morrow has not established that this abusive behavior
4 occurred because of his gender, and therefore he fails to satisfy the first element. To be sure,
5 Morrow alleges that Dion mistreated men because she is a lesbian and wanted to act “manly.” *Id*
6 at 3. But this is an attempt to explain Dion’s behavior by reference to an alleged trait of her own
7 and does not explain how **Morrow’s** gender was motivating Dion’s behavior. Further, Morrow
8 offers no concrete facts or details about the supervisor’s behavior that would paint a picture of
9 gender-based abuse.

10 Morrow’s allegations meet the second element, however, because he has alleged that the
11 supervisor’s conduct was unwelcome, as it was aggressive and insulting.

12 Finally, turning to the third element, while Morrow has alleged actions that are pervasive,
13 it is less clear that he successfully alleges sufficiently severe actions: he describes “yelling and
14 cursing” in one instance, consistent aggression, and states that this behavior had gone on for four
15 years. *Id.* To definitively satisfy the third element, Morrow would have to allege further details
16 about the aggressive behavior.

17 Therefore, Morrow fails to sufficiently allege this claim for hostile work environment, and
18 the Court dismisses it without prejudice. The Court will grant Morrow leave to amend his
19 complaint by alleging facts that satisfy the elements of this claim.

20 Morrow is advised that if he files an amended complaint, the original complaint no longer
21 serves any function in this case. The amended complaint must be complete in and of itself without
22 reference to prior pleadings or other documents. The court cannot refer to a prior pleading or
23 other documents to make Morrow’s amended complaint complete.

24 **III. Conclusion**

25 IT IS THEREFORE ORDERED that Morrow’s Application for Leave to Proceed *In*
26 *Forma Pauperis* (ECF No. 1) is GRANTED. Morrow is permitted to maintain this action to
27 conclusion without prepaying fees or costs or giving security for them.
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1 IT IS FURTHER ORDERED that Morrow's first discrimination claim is dismissed
2 without prejudice and with leave to amend.

3 IT IS FURTHER ORDERED that Morrow's second discrimination claim is dismissed
4 without prejudice and with leave to amend.

5 IT IS FURTHER ORDERED that Morrow's first retaliation claim is dismissed without
6 prejudice and with leave to amend.

7 IT IS FURTHER ORDERED that Morrow's second retaliation claim is dismissed without
8 prejudice and with leave to amend.

9 IT IS FURTHER ORDERED that Morrow's hostile work environment claim is dismissed
10 without prejudice and with leave to amend.

11 IT IS FURTHER ORDERED that Morrow has until September 21, 2020, to file an amended
12 complaint. If Morrow does not amend his complaint by that date, the Court will recommend to the
13 district judge that this matter be dismissed.

14 DATED: August 20, 2020.

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17 BREND A WEKSLER
18 UNITED STATES MAGISTRATE JUDGE
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